Nos. 20378, 20447 and 20522

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK BOARD, ET AL.,

Appellants

v.

SIDNEY ELLIOTT, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

APPENDIX TO BRIEF FOR APPELLANTS FEDERAL HOME LOAN BANK BOARD AND FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

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INDEX TO APPENDIX

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

N THE MATTER OF THE DISSOLUTION :
F THE SPRINGFIELD SAVINGS SOCIETY : CASE NO. 629
F CLARK COUNTY, OHIO :

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O P I N I O N

Rendered on the 23rd day of June, 1966

.....

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.....

HERER, P. J.

This matter is pending in this Court on an appeal on questions f law from an order of the Common Pleas Court of Clark County in n action involving the dissolution of The Springfield Savings ociety determining that Appellant, the City of Springfield, was ot entitled to participate in the distribution of its surplus assets.

The cause is before the Court on Motion of Appellee to dismiss ne appeal for the reason that Appellant has not filed its brief nd assignments of error within the time provided by Rule VII of nis Court or shown good cause for such failure, and for the reason nat a Bill of Exceptions is required to portray the claimed error nd none has been filed. Appellee has moved also to strike

Appellant's brief. Appellant filed a brief while this matter was pending on an appeal on questions of law and fact but has filed n additional brief since such appeal was reduced to an appeal on questions of law. Such brief will be considered by the Court as a brief and assignments of error on the law appeal on the merits n Appellee's Motions to strike this brief and to dismiss the appeal for failure to file brief and assignments of error will be overruled. The record discloses that no Bill of Exceptions has been filed herein and the Court will proceed to consider the appeal in the light of the record before us in the absence of a Bill of Exceptions.

The Trustees of Appellee Savings Society elected to dissolve the Society voluntarily as provided in Section 1702.47 (C)(3) of the Revised Code. Neither the law nor the Regulations of the Society provides a method for, or designates the persons who shal be entitled to receive a distribution of Surplus assets upon dissolution of the Society. Under such circumstances, Section 1702. (D)(3) of the Revised Code authorizes the Trustees to determine a adopt a plan for the distribution of such assets. Item (1) of th Plan submitted to the Court enumerates the classes of accounts, t owners of which are to be considered "Depositors". Among these a holders of certificates of deposit during the period from 10/29/6 to 2/9/65 and governmental authorities for whose account the Soci held monies pursuant to the Uniform Depository Act of the State o Ohio continuously during said period.

Item (4) of the Plan adopted by the Trustees provides that such rplus shall be distributed as follows:

"(a) To and among such Depositors as the Court shall determine be the beneficial owners of such Surplus.

"(b) As between such Depositors, such Surplus is beneficially ned by each in the proportion which his Deposit Balance bears to e aggregate of the Deposit Balance of all Depositors * *.

"(c) Each Depositor who is determined by the Court to be a neficial owner of the Surplus shall be entitled to receive, subject all the terms and provisions of the Plan, at the dates of dis- ibution determined in the manner hereinafter provided, cash in an ount equal to his proportionate share of Surplus as determined in) above."

It is conceded in argument that Appellant, the City of Spring- eld, is a "Depositor" as defined in the Plan.

Supervisory power over the dissolution of the Society is con- rred upon the Common Pleas Court by Section 1702.49 (G) of the vised Code, to be exercised as provided by Section 1702.50 of the vised Code. The latter section empowers the Common Pleas Court to judicate the question at issue here.

The question to be determined is whether the Common Pleas Court red in determining that Appellant, the City of Springfield, was t the beneficial owner of a share in such Surplus.

The Common Pleas Court approved the Plan of Distribution of the sets of the Society adopted by the Trustees with certain exceptions

spelled out in the judgment entry and determined that the only t
of Depositors entitled to share in the surplus fund of the Socie
are regular savings pass book Depositors, School Savings Deposit
and holders of Certificates of Deposit other than Certificates c
Deposit issued to a governmental subdivision under the Uniform
Depository Act of the State of Ohio. The Court's opinion states
that its decision is based upon the reasoning of the Court in In
Dissolution of the Cleveland Savings Society, 91 Ohio Law Abs. 2
192 N.E. (2d) 518.

In that case, the Plan adopted by the Trustees for the dis-
tribution of the Surplus defined "Depositors" as any person hold
or entitled to hold, a savings pass book issued by the Society p
suant to the rules and regulations relating to savings accounts
promulgated by it and provided that: "(3) Subject to the approv
of the court in the Special Action hereinafter provided: (a) Th
Depositors, as of the close of business December 31, 1958, and n
other persons, are the beneficial owners of, and are entitled to
receive distribution of the Surplus of Society."

Involved in that action were the rights of depositors, form
depositors, including corporate depositors, political subdivisio
as owners of public deposits, persons owning or interested in
Christmas Club accounts, escrow accounts, Employees' United Stat
Savings Bond Depositors, funds held by borrowers, borrowers' con
struction loan funds, hypothecated deposits on installment loans
outstanding certified checks and outstanding checks, official ch

er depositors or creditors of the Society, and other persons might have rights upon the assets of the Society.

At Pages 321, 322, the Court said that:

"It appears to this Court that for any persons, or classes of sons, to be entitled to share in the distribution of the remain- assets of Society, it would be incumbent on them to show in a vent dissolution of this kind that not only a debtor-creditor ationship had been created, but also that an intangible ownership erest in the surplus had been created. Only those persons who icated an intention to become regular savings depositors, who eived savings passbooks as evidence of their property interest in iety, who were entitled to receive dividends rather than interest, nothing, whose right to withdraw their funds was determined in ordance with the regulations and Rules Relating to Deposits (See ition Exr. 1-D), had intangible ownership interests in Society.

"Persons owning or interested in Christmas Club accounts, row accounts, Employees' United States Savings Bond deposits, ds held for borrowers, borrowers' construction loan funds, othecated deposits on installment loans, outstanding certified cks, outstanding checks, and official checks did not meet the uirements necessary to create an intangible ownership interest. tracts with such persons were special contracts which dis- guished them from regular savings depositors. They had no savings sbooks in Society, received no dividends from Society, and their nt, if any, to demand payment of such funds was determinable in

accordance with their special contracts or general law and not governed in any way by the regulations and Rules Relating to Dep Therefore, this Court finds that these persons, or classes of pe shall not be entitled to share in the distribution of the remain assets of Petitioner.

"Public funds were held by Society for the account of certa municipal corporations pursuant to special written contracts whi were governed by the provisions of the Uniform Depository Act of State of Ohio. These contracts provided for the payment of a fi rate of interest, the repayment of all money held, and were full secured by obligations of the United States of America. In ligh the distinctive nature of these deposits, as contrasted to the regular savings deposits in Society, this Court finds that this class of depositors shall not be entitled to share in the distribution of the remaining assets of Petitioner."

In Society for Savings in the City of Cleveland v. Peck, Ta Commr., 161 Ohio St. 122, 118 N.E. (2d) 651, the court held that the depositors owned the capital, surplus, reserve fund and undivided profits of a Savings Society. The court noted that the same principle had been expressed by courts of other states in Bank Commissioners v. Watertown Savings Bank, 81 Conn., 261, 70 A., 1038; Barrett v. Bloomfield Savings Institution, 64 N.J. Eq. 425, 54 A. 543; Huntington v. Savings Bank, 96 U.S. 388, 24 L. E. 777; Lewis, Admr., v. Lynn Institution for Savings, 148 Mass., 2 19 N.E., 365; Cogswall v. Rockingham Ten Cents Savings Bank, 59

3 Worcester County Inst. for Savings v. City of Worcester, 10
ıhing (Mass.), 128, and Providence Inst. for Savings v. Gardner
.I., 484.

We must begin our consideration of the question at issue here,
ın, with the general proposition that ordinarily the Depositors
fthe Springfield Savings Society, including all holders of
etificates of deposit, own the beneficial interest in the Surplus.
ıthe case here, unlike in In Re Dissolution of Cleveland Savings
ɔiety, supra, the Plan of Distribution adopted by the Trustees
ained governmental authorities as Depositors. Also, in that case,
ı Trustees specified the type of Depositors entitled to share in
ı distribution of the Surplus. Here, the Plan adopted by the
rstees empowered the Court to determine what Depositors were the
eficial owners of the Surplus. In the Cleveland case, the plan
dpted by the Trustees eliminated every depositor from partici-
aion in the Surplus excepting the holders of savings pass books who
eeived dividends rather than interest and whose right to withdraw
ıir funds was determined in accordance with the regulations and
ues Relating to Deposits. Here, the court determined that holders
fcertificates of deposit, other than governmental agencies, were
eficial owners of the Surplus. The City of Springfield was
ied the right to participate in the distribution of the Surplus
ɔely because the Society was required by Section 135.16 of the
ised Code to pledge security for the City's deposit.

The claim filed by the City of Springfield is predicated upon claimed deposits in the nature of a checking account, Time Certifi Active Deposits (Savings Society), Active Deposits (commercial ban Project Expenditure Account (commercial bank), and Project Expendi ture Account (Savings Society). In the absence of a bill of exce or a finding by the court of Appellant's ownership of such accou we know nothing about the nature of such accounts or if they exis excepting that the Petition herein states that Appellant has Depo in the Society pursuant to the Uniform Depository Act and the judg ment entry states that holders of Certificates of Deposit, other than governmental subdivisions, shall share in the distribution of the Surplus. We can assume, therefore, only that the City owns Certificates of Deposit in some amount pursuant to the provision the Uniform Depository Act of the State of Ohio.

In the opinion of Bank Commissioners v. Watertown Savings Ba supra, it is said that:

"It is true that the profits or income of savings-banks are not all payable at the same time or in the same way, and that they may be held by the bank as a fund until they have reached a specif amount. This is for the sole purpose of protecting depositors against unforeseen contingencies. There is nothing in these statutes which militates against the general proposition that the income or profits of savings-banks belong to the depositors and a part of the deposits. In the end, it is the general spirit and purpose of the charters of savings-banks and of the laws of this

ce, that depositors, or their representatives, are entitled to the pecuniary benefits arising from the deposits, less the sonable expenses that may be chargeable thereon." (Emphasis this Court.)

In Barrett v. Bloomfield Savings Institution, supra, it is il on Page 434 in the opinion in quoting with approval from the inion in Hannon v. Williams, 7 Stew Eq., 255:

"In a savings bank the depositors bear, in great degree, the m relation to each other and to the property of the bank as do e stockholders in other monetary institutions. To the corporation lf they occupy the double relation of stockholders and creditors. rosperity they are the stockholders among whom the profits are ded. In case of insolvency they are the creditors, and usually e only creditors, among whom the remaining assets are to be dis- buted."

The Surplus here is the fruit of the deposits. It is a part he deposits and belongs to the Depositors just as an apple is a r of and belongs to the tree which brought it into being.

In Lewis, Admr. v. Lynn Institution for Savings, supra, it is il at page 243 of the opinion that:

"* * * the fundamental idea has never been departed from, that lthe funds and investments of a savings bank are held exclusively rthe benefit and security of the depositors * * *."

We cannot conclude, as did the court below, that the Uniform psitory Act should operate to deprive governmental subdivisions

of any benefit accruing to their deposits of public funds. A portion of the funds of the City of Springfield were withheld by the Society to create the Surplus for the benefit and security o all of the Depositors of the Society. Since the Surplus was created for the benefit and security of the Depositors, we see r reason to deprive the City of the benefits of the Surplus becaus the State has required the pledge of securities for the added security of the City's deposits. This added protection afforde the public by the Uniform Depository Act in no way alters the status of the City's deposit. In Eastman v. Ohio Mutual Savings and Loan Company, 20 Ohio Law Abs., 506, it was said that the fa that a deposit is secured by pledge of securities does not chan the character of a deposit. The fact that security is given fo a governmental subdivision's deposit is a fact to be considered only when the assets of the Society are insufficient to repay th deposits. The Common Pleas Court did not follow the holding in h Cleveland case that only owners of deposits evidenced by passbo are entitled to share in the Surplus. The Court here allowed th holders of Certificates of Deposit other than governmental sub- divisions to share in the Surplus.

There may be some facts relative to the City's Certificate Deposit which would distinguish them from other Certificates of Deposit and would support a conclusion that the City's Certific did not entitle it to participate in the Surplus. Section 135. the Revised Code provides that the appropriate board shall awar

eosit to the financial institution offering to pay the highest
ae of interest which can legally be paid. It may be that the
iy enjoyed a rate of return on its Certificates of Deposit in
xess of the rate of return paid by the Societv to other holders
fCertificates of Deposit and of passbooks and of other deposits
emitted to participate in the Surplus as to warrant a finding
nt the City has enjoyed such special benefits beyond its con-
rbution to the Society's Surplus that it should not share therein
ause it is in a different class than other Depositors. But,
n Court did not base its judgment on such distinction. The
gment, as shown by the Court's opinion, was based solely upon
n fact that the City's Deposit was secured by pledge of securities.

In Andrews v. Board of Liquor Control, 164 Ohio St. 275, 131
. (2d) 390, the Court held that:

"3. It is an invariable rule that the court speaks only
ough its journal, and where its opinion and its journal are in
flict the latter controls and the former must be disregarded.

"4. However, where it is essential in the interest of justice
a reviewing court to ascertain the grounds upon which a judgment
a lower court is founded, and the judgment entry fails to disclose
h grounds, resort may be had to the opinion of the lower court to
ertain those grounds."

At 281, the Court said that resort could be had to the opinion
the lower court to ascertain the grounds upon which a judgment is
dered where there is no conflict between the opinion and the

judgment entry. There is no such conflict here and we have deemd it essential in the interests of justice to examine the opinion f the Common Pleas Court to ascertain the grounds upon which its jd ment was founded.

We conclude that the Common Pleas Court erred in denying th City of Springfield a right to share in the Surplus arising out f its ownership of Certificates of Deposit because such deposit wa secured as required by the Uniform Depository Act of the State c Ohio.

The judgment of the Common Pleas Court will, therefore, be reversed and the cause will be remanded to that Court for furthe proceedings according to law.

.....

CRAWFORD and KERNS, JJ., concur.

IN THE COURT OF COMMON PLEAS OF CLARK COUNTY, OHIO

In the matter of:	)	
	)	
THE DISSOLUTION OF THE	)	CASE NO. 60513
	)	
SPRINGFIELD SAVINGS SOCIETY	)	D E C I S I O N
	)	
OF CLARK COUNTY, OHIO	)	

GOLDMAN, J.

This matter is before the Court on a petition for judicial supervision of proceedings in dissolution filed by the Springfield Savings Society of Clark County, Ohio, hereinafter referred to as "the petitioner."

The action was instituted pursuant to section 1702.50 of the Revised Code of Ohio, a part of the chapter on nonprofit corporations, and deals specifically with the jurisdiction of the Court in winding up the affairs of a voluntarily dissolved corporation.

Petitioner is a corporation organized in 1873 as a mutual savings society without capital stock.

On December 31, 1933, it was reincorporated due to a change in the law, and from those dates until February 9, 1965, it carried on its business as a mutual savings society pursuant to chapter 1109 R.C.

judgment entry. There is no such conflict here and we have deemed it essential in the interests of justice to examine the opinion of the Common Pleas Court to ascertain the grounds upon which its judgment was founded.

We conclude that the Common Pleas Court erred in denying the City of Springfield a right to share in the Surplus arising out of its ownership of Certificates of Deposit because such deposit was secured as required by the Uniform Depository Act of the State of Ohio.

The judgment of the Common Pleas Court will, therefore, be reversed and the cause will be remanded to that Court for further proceedings according to law.

.....

CRAWFORD and KERNS, JJ., concur.

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The First State Bank in the village of South Charleston, Ohio, was acquired by petitioner on or about June 10, 1950. The Savings Society Commercial Bank, with offices in Springfield, Ohio, was organized by petitioner on April 20, 1956. Each of these two banks were thereafter operated as subsidiary corporations of petitioner as commercial, savings, and special plan banks.

On February 6, 1965, the above two institutions were merged and their name changed to "The Springfield Bank," and thereafter all of the facilities and operations of the newly merged and named institution and those of petitioner were combined under the name "The Springfield Bank."

On February 8, 1965, all of the outstanding shares of the newly created Springfield Bank were sold to the Ohio Center Corporation, an Ohio corporation.

On February 9, 1965, petitioner sold and transferred to the Springfield Bank all of its operating assets, and received from the Ohio Center Corporation and the Springfield Bank, in payment for all of its assets, the sum of $2,504,333.31 in cash. On that date also the Springfield Bank assumed petitioner's deposits and liabilities.

All of the issues dealt with in this opinion relate to the proper distribution of this sum of money,

in some instances referred to in the record as "net assets" of petitioner, and in other instances as "surplus fund." It might be pointed out that section 1109.10 R.C. defines "surplus fund" as the "net assets" of a society for savings or of a savings society over and above the amount of its debts and deposits, etc. Thus, when either term is used, we are referring to the $2,504,333.31 which petitioner has on its hands for distribution.

The transactions involving the merger and the sale of assets were undertaken pursuant to an agreement entered into on June 17, 1964, by and between the trustees of petitioner and the Ohio Center Corporation, and the sale and acts of the trustees taken in connection with the execution and performance of the agreement were approved by resolution adopted at a special meeting of the members and other depositors of petitioner on December 8, 1964.

All of the above transactions were approved by the Superintendent of Banks of the State of Ohio and the Federal Deposit Insurance Corporation, and were undertaken and completed according to law.

None of the transactions or proceedings above described were questioned or challenged, and the legality or validity of these proceedings are not an issue in this action.

On February 10, 1965, following sale of its assets as described, and as authorized by section 1702.47 (C) (3), the trustees of petitioner adopted a resolution to dissolve its corporate existence as a mutual savings society, and on February 16, 1965, a certificate of dissolution was filed in the office of the Secretary of State.

Also on February 10, 1965, and pursuant to section 1702.49 (D) (3), the trustees of the petitioner adopted a plan to distribute the cash it received as the sales price for its operating, investment, and other assets. This plan proposed that the surplus fund be distributed to and among such type or types of former depositors of the petitioner as the Court shall determine to be the beneficial owners as set forth in the plan, and further that each depositor found entitled to share in the surplus assets shall be entitled to share in the proportion that his deposit balance bears to the aggregate of the deposit balances of all eligible depositors. (All underlining in this opinion is by the Court.)

The term "deposit balance" is defined in the plan as:

(a) the amount of the lowest credit balance in the account or to the credit of an eligible depositor during the period commencing with

the opening of business on October 29, 1964, and ending with the assumption of the petitioner's time and demand deposit liability by the Springfield Bank (which was on February 9, 1965); or

(b) the face amount of a time certificate of deposit owned by an eligible depositor continuously during the above described period;

excluding, however, any amount deposited or caused to be deposited to the credit of an eligible depositor in an account, by the purchase of a time certificate of deposit or otherwise, after June 18, 1963, by persons with certain knowledge and information as more particularly described in said plan, and any amounts credited after June 18, 1963, as interest on any amounts so deposited or caused to be deposited by such persons.

Further comment on the significance of several of the dates noted would be helpful, and is as follows:

The record discloses that June 18, 1963, is the date on which discussions began between officers and trustees of petitioner and a third person relative to its conversion from a mutual savings society to a stock

company, and that after that date several more meetings were held by the same persons at which the subject was further discussed and explored.

October 29, 1964, is the date on which approximately 26,000 copies of a letter were mailed to all depositors over the signature of the president of petitioner, in which they were notified for the first time that the trustees had approved the combining of the facilities of the various banks into one institution to be known as "The Springfield Bank," and notifying the depositors further that qualifying depositors could look forward to participating in the surplus distribution in dissolution, of the remaining assets of the Savings Society, by further advising them that the extent of participation in the distribution would probably be based upon the amount of deposit on the date the letter was mailed, to-wit, October 29, 1964, or on the date of closing of the sale of Society's assets (which was February 9, 1965), whichever was lower. The letter also gave notice of a meeting to be held on December 8, 1964, at which time the transactions involved in the changes would be submitted to the members and depositors for their approval. A summary of the terms of the proposed sale and an explanation and the reasons for the

proposed transactions was likewise included, so that full knowledge of what had happened and what was likely to happen was imparted on October 29, 1964.

February 9, 1965, is the date when petitioner's deposit liabilities were assumed by the Ohio Center Corporation and the Springfield Bank.

Thereafter, on February 20, 1965, the petition before this Court for judicial supervision of the proceedings in dissolution was filed, and the Court in particular was asked to determine the rights of the various types of depositors set forth in the petition and in the plan of distribution which was attached thereto, in and to the surplus fund and the other assets of petitioner and how the shares should be determined and paid, and the Court was asked for further guidance with respect to such other and additional matters with respect to which the Court may wish to order and adjudge.

Upon filing of this petition, the Court issued some orders with respect to a number of matters incident to winding up, which included the matter of the notices which were to issue and the manner in which claims were to be presented, dates were set for a preliminary hearing on claims, objections, statements and stays of action, and several hearings were held with respect to these matters

and proper orders made.

Testimony in connection with certain issues was concluded on May 19, 1965; briefs dealing with the same were ordered filed by June 1, 1965. The issues raised and arising out of the previous filing of various claims and statements were then submitted to the Court for decision on the basis of the record made up of the testimony, exhibits and briefs.

This opinion will therefore concern itself primarily with the determination of which types of depositors shall be entitled to participate in the distribution of the cash surplus of petitioner.

There are few reported cases dealing with the issues before this Court, but it is appropriate to note that many of the questions which have been raised in this case were similarly raised and considered in the case of In re Dissolution of the Cleveland Savings Society, 25 O.O. (2d) 402, which is reported also in 91 O.L.A., page 289. This case arose out of the sale by the Cleveland Savings Society, which was also a mutual savings bank, of its assets to the Society National Bank of Cleveland and the subsequent dissolution of the Cleveland Savings Society and the distribution of its surplus funds.

The Court has carefully considered that decision, and finds itself in general agreement with the reasoning and the conclusions reached in that case. In this opinion reference will be made to it, and for the sake of brevity this Court will refer to it simply as "the Cleveland case."

We come now to a consideration of the several issues to be determined by this Court.

I.

O. S. Kelly Company and one Thomas R. Laudermilk, both of the city of Springfield, Ohio, filed claims seeking to participate in the distribution of the surplus funds as former depositors.

O. S. Kelly Company was a substantial depositor in the Springfield Savings Society from 1952 to 1956. In 1956 the law was changed prohibiting a savings society from accepting deposits from corporations for profit such as O. S. Kelly, resulting in the establishment of the Springfield Society Commercial Bank as a subsidiary of the Savings Society as previously noted.

Kelly accordingly withdrew its deposit from the Savings Society and transferred it to the Springfield Society Commercial Bank. It now claims that, by reason

of these circumstances, its interest in the surplus of the Savings Society has in effect been preserved notwithstanding such change, and that, in view of its uninterrupted and continuous status as a depositor first in the Savings Society and thereafter in the Commercial Bank, it has contributed to the accumulation of the undistributed net surplus and ought therefore be entitled to participate along with all other depositors who may be considered and declared eligible to do so.

Laudermilk was an individual depositor in the Springfield Savings Society from 1943 to 1963, at which time his account was closed. No reason was offered for the closing of the account. He now asserts that his deposit contributed to the prosperity of the bank and was proportionately responsible for the Society's favorable financial condition, and that he ought therefore be entitled to participate along with current depositors in the distribution of the surplus.

This Court finds that there is some merit to these claims, in that each claimant undoubtedly did to some extent at least, by reason of their association with petitioner, contribute to the well-being and prosperity of the Springfield Savings Society. In this respect, however, these claimants may be like hundreds or perhaps

thousands of other depositors who at one time either had deposits in the Savings Society or did business with it and may have withdrawn their deposits or accounts from petitioner for one reason or another, not knowing nor having any reason to anticipate the chain of events which resulted in the dissolution of that institution and the resulting windfall now to be distributed. Indeed, it may be said with reason that every one of the untold thousands who have ever done business with or made a deposit with the Savings Society since its organization in 1873 have in a sense contributed to its affluent position.

Unfortunately, however, neither claimant was a depositor of petitioner at any time after and between October 29, 1964, and February 9, 1965. The issue which the Court has to determine is whether or not either of them are lawfully entitled as former, but not current, depositors to share and participate in the distribution of the surplus fund.

This exact issue was raised and carefully considered in the Cleveland case, and the conclusion there reached may be found in the sixty syllabus of the decision in that case as it appears in 25 O.O. (2d), and is as follows:

"The persons entitled to share in the remaining assets of a mutual savings bank are those persons who have deposits in the bank at the time of winding up."

In the same case as it is reported in 91 O.L.A., the sixth syllabus states the rule more precisely, and it is as follows:

"Surplus in a mutual savings bank is held primarily for the protection of current depositors and not former depositors."

The Court in that case reasoned that the surplus was created and maintained in the main for the protection of existing depositors from loss, and that when any person ceased to be a depositor his interest in the surplus was at an end. Such a person, it held, was no longer liable to contribute to any loss to which the remaining depositors might be subjected, nor had they any right to receive further dividends.

With respect further to the nature of the interest of the depositors of a mutual savings bank upon which their right to share in the surplus fund depends, the Supreme Court of the United States, in the case of Society for Savings in the City of Cleveland v. Bowers, Tax Commr., 349 U.S. 143, stated:

"To maintain their intangible ownership interest they must maintain their deposits. If a depositor withdraws from the bank, he receives only his deposits and interest."

In the case of Morristown Institution for Savings v. Roberts, a New Jersey case, reported in 42 N.J.Eq. 496, the same issue was being considered, and it was there held that the surplus of a mutual savings bank belonged to current depositors to the exclusion of all those who had withdrawn their deposits at that time. At page 498 the Court in that case stated:

"The State has no right to the surplus. Nor have those who were depositors but withdrew their deposits before the institution of the winding up proceedings any claim to it. The surplus was created and maintained for the protection of depositors from loss by reason of the depreciation of securities, etc., to protect them against the casualties and contingencies to which the funds of the institution were liable and which might impair their deposits. It stood as such indemnity to the depositors who were such for the time being. So long as a person continued to be a depositor, so long it stood for his protection, and when by

withdrawing his funds he ceased to be a depositor, his interest in it was at an end. He thus relinquished his interest in it, and as he would not be liable to contribute to any loss to which the remaining depositors might be subjected, so on the other hand he would not be entitled to any participation in the surplus."

The statements and briefs of both Kelly and Laudermilk fail to cite a single citation or decision of any court holding contrary to the views and decisions above noted.

Thus, while this Court agrees that former depositors and customers of the Savings Society certainly helped it to prosper and thus in an indirect way contributed to building up the net assets of the institution, nevertheless this Court cannot find any legal basis upon which it can properly allow their claims.

The Court rules, therefore, that O. S. Kelly Company and Laudermilk are not entitled to share in the distribution of the surplus funds, and their claims are denied.

Leonard Epstein filed a statement in opposition to the plan of distribution proposed by petitioner. He opened a deposit with petitioner on December 9, 1964, which was only one day after a meeting was held by the depositors and members of the Savings Society to authorize the sale and transfer of all of the assets of the Society and to approve and ratify the actions of the trustees taken in connection with the proposed transactions, of which meeting notice was given in the letter of October 29, 1964, previously described. On that date, to-wit December 9, 1964, claimant deposited $25.00 by mail, but later increased his deposit so that by December 29, 1964, the balance in his account was $3,625.00.

In his statement he claims that he was not informed until March 1965 that the petitioner had sold its assets, had voted to dissolve and distribute its surplus to depositors, and that persons who were not depositors prior to October 29, 1964, would not share in the distribution of this surplus. He complains that this denial of his right to participate amounts to illegal discrimination against all persons who became depositors of the petitioner after October 29, 1964, and he asserts that the trustees were required to distribute this surplus

to all who were depositors on the date the Springfield Bank assumed petitioner's liabilities, which was February 9, 1965.

It should be remembered that October 29, 1964, was the date when more than 26,000 copies of a letter (Petitioner's Exhibit B) were sent out to depositors and others, advising that the trustees had approved the various transfers hereinbefore set forth, all of which was previously mentioned in this opinion. Following is part of the exact language contained in that letter:

"In the opinion of counsel, the extent of participation in this distribution will be based upon the amount of deposit on the date this letter is mailed, or on the date of the closing of the sale of Society's assets, whichever is lower. . . Also, no one making any new or additional deposit before the closing should anticipate that he will participate by reason thereof."

The record on the issue of notices discloses that after October 29, 1964, additional notices to the same effect as that of October 29 were mailed, and that wide general notice of what was contemplated and happening was given to the local community and to the business community throughout the United States. These notices included statements which appeared in the New York Times,

the Journal of Commerce, the Wall Street Journal, the United States Press International, the American Banker, the Savings Bank Journal, and Business Week. These notices also contained the information that depositors after October 29, 1964, were not likely to participate in any distribution of surplus.

The plan before the Court for consideration provides in Item 2 thereof that the term "deposit balance" as therein used means the amount of the lowest credit balance in the account or to the credit of a depositor during the period commencing with the opening of business on October 29, 1964, and ending with the assumption of Society's time and demand deposit liabilities by the Springfield Bank (which took place on February 9, 1965).

This depositor thus takes issue with the two dates which petitioner had set forth in its plan, between which dates a depositor was required to have had funds on deposit in order to participate in the surplus.

In the Cleveland case, the Court adopted a general rule that only persons who were depositors on a single date, to-wit December 31, 1958, the date upon which the Cleveland Savings Society transferred its assets (which date is comparable to the February 9, 1965, date in the instant case), were entitled to share in the

surplus. However, in that case the Court also gave recognition to a factor which similarly is here involved, in that prior to the date of such transfer those who in the Cleveland case clearly had knowledge of the proposed transactions, or were likely to have such knowledge because of ready access thereto, might unjustly profit from such knowledge, and the Court thereupon set an earlier date, to-wit December 1, 1957 (which compares with the October 29, 1964, date in the instant case), subsequent to which no new accounts or increases in old accounts would be considered in sharing surplus.

In the Cleveland case the Court found as a matter of fact that only members, trustees and officers of the Savings Society and the directors, stockholders and officers of the National Bank of Cleveland, the purchaser of the assets of the Savings Society, might have had some knowledge as early as December 1957 of what was happening, all because the negotiations were, in the words of the Court, "a well-kept secret." The Court in that case thus barred the above designated persons from participating in the surplus to the extent of any new or increased accounts opened by any of them after December 1, 1957. However, the Court in that case discussed the possibility of such knowledge also on the part of

third parties, but the record in the Cleveland case being devoid of any evidence of such knowledge on the part of third persons, the Court found that there were no parties other than the officers, members and trustees of the banks involved who had any access to any knowledge of what was being considered, and for that reason made no finding with respect to any parties and persons other than those noted.

The negotiations in the instant case, however, were in the first instance not kept so secret, as will later be noted, and when on October 29, 1964, they were made public, the limitations upon the right to participate in the surplus funds were then clearly stated.

The rule found by the Court in the Cleveland case to be applicable to situations of this kind is stated in 7 O.J. (2d) 1965 Cumulative Supplement, at page 62:

> "The intangible ownership interest in a mutual savings bank for any depositor is the proportion his deposit balance bears to the aggregate of the deposit balances of all depositors, and any remaining assets on dissolution are distributed on such pro rata basis on the dates set by the Court as determining dates for such

distribution."

The Court in the Cleveland case also took cognizance of the fact that the cutoff date determined upon in that case worked hardships on some, and that it created windfalls for others. The Court went on to add, however, that "the same would be true if any other date were selected."

This Court therefore finds that the plan of distribution as submitted by petitioner, in so far as it is limited in the first instance to depositors who were such between October 29, 1964, and February 9, 1965, is prudent and reasonable and, considering the circumstances and the events that transpired, the determination of these dates was necessary and just in order to assure a proper and equitable basis upon which to divide the surplus fund.

With respect to his claim that he was not informed until March 1965 of the limitations to be imposed on the right to share as above noted, the Court finds that this depositor did have knowledge of the same. This Court is also of the opinion that, even if depositor had no actual knowledge, in view of the widespread notices given after October 29, 1964, his ignorance of these limitations would not prevent their application to him.

Certainly it would be manifestly unjust to

deny Mr. Laudermilk, a long-time depositor, who had but recently closed his account unaware of what was impending, the right to participate in the distribution of the assets, yet at the same time permit this depositor, who the Court finds had actual knowledge of what had happened and of what was to occur, to share in the distribution of the surplus, in spite of the notices widely circulated that depositors in his category would not be permitted to participate. It may also be noted that if he were allowed to share in the distribution of the surplus in spite of the notices given and in spite of the proposed plan, any person who opened a new account or increased his old one after notice of the transactions was given on October 29, 1964, would similarly be permitted to share in the surplus, and the results would be so unfair, unjust, and such unwarranted reward for sheer and patent speculation as, in the words of petitioner, "to shock the conscience."

This claimant dismisses the latter possibility as a "horror tale." In fact, one who reads his vigorous statement and reply memorandum might conceive an image of him as an unsuspecting, naive and gullible victim who was sold a ticket to a banquet but is not permitted to sit at the banquet table. This is an image

difficult to accept. The record discloses that this claimant is a member of a New York law firm and is one of three lawyers from that same firm who made deposits earlier with petitioner and had early access to information about the petitioner's intention to sell its assets and that a potential windfall was in store, under circumstances which are more fully discussed in the next numbered item which immediately follows in this opinion.

In the opinion of this Court, none of the citations submitted by depositor in support of his position warrant the conclusion he urges, nor is there anything in the statutory law of this State or in any Federal regulations, law or decision which would require or justify the Court to so hold.

The Court therefore finds as a matter of fact that this depositor had actual knowledge on December 9, 1964, the date of his initial deposit, of the proposed sale and the likely distribution of petitioner's assets.

The claimant not being a depositor on October 29, 1964, the Court finds that he is not entitled to share or participate in the distribution of the surplus fund.

The case of fourteen depositors:

The plan of distribution submitted by petitioner contains the following provisions:

"2. The term 'deposit balance' as used herein means . . etc. . . ; provided, however, that any amount deposited or caused to be deposited to the credit of a depositor in an account, by the purchase of a time certificate of deposit or otherwise, after June 18, 1963, by a depositor having knowledge or information that the officers or trustees of the Society had discussed with individuals not associated with the Society the possibility of terminating the activities of the Society as a mutual savings bank by a sale or transfer of assets or otherwise, or that officers of Transcontinental Investing Corporation or of an unidentified investing corporation with extensive holdings in Ohio had expressed an interest in exploring the acquisition of the Society and its subsidiary commercial banks, and any amounts credited after June 18, 1963, as interest on any amounts so deposited or caused to be deposited, shall be excluded in determining the

amount of the lowest credit balance in an account or to the credit of a depositor or the face amount of such a time certificate of deposit."

The record discloses that before the sale and transfer of petitioner's assets actually took place, and more specifically between August 1963 and May 1964, between fifty and sixty deposits were received by petitioner from persons and organizations outside of Ohio who had no previous association or history of association with either petitioner or this community.

The record further discloses that the first serious indication of an interest in terminating the activities of the petitioner as a mutual savings bank by sale or transfer of assets or otherwise was made manifest on June 18, 1963. On that date a certain securities broker and financial analyst who made a specialty of studying and analysing financial institutions and in particular mutual savings societies, and who was familiar with the proceedings in the dissolution of the Cleveland Savings Society, came to Springfield and discussed with officers and trustees of petitioner the possibility of terminating the activities of the petitioner as a mutual savings bank.

The record discloses that following such

discussions he determined there was a strong likelihood that the petitioner would sell and transfer its assets, thereby creating a cash surplus which would be distributed. Thereafter, on December 5, 1963, this same broker introduced to the officers and trustees of the petitioner persons who were officials of the company which subsequently purchased the assets, and then, as a broker, he helped to negotiate the actual purchase and transfer of petitioner's assets, for which latter services he was reimbursed by the purchaser.

However, between June 18, 1963, and December 5, 1963, and before the negotiations between buyer and seller for the purchase of petitioner's assets were formally undertaken, this same broker, without the knowledge or consent of petitioner, had notified by letter and otherwise a large number of persons, including his partners, his clients and prospective clients and their friends, of the likelihood of the conversion of petitioner from a mutual savings bank, and recommended to these people that they make deposits of any of their "idle funds" so that they might participate in the cash surplus should a sale be consummated, even though the current rate of interest would be lower than they could receive elsewhere. He also conveyed this information

to a number of security brokers in Philadelphia and New York. At a hearing held in this Court dealing with this very matter, the broker appeared and testified under oath as a witness substantially as hereinabove related.

The record further discloses that petitioner took notice of these unusual deposits and called the same to the attention of the broker, and at the instance and urging of petitioner, and beginning in November 1964, the broker contacted each of these depositors and made an effort to persuade them to withdraw their accounts, advising them that he had doubt as to the legality of their deposits, and advising them further that they would not be allowed in any event to participate in the distribution of the cash surplus. Most of these depositors followed his advice and withdrew their deposits, but fourteen of them failed and refused to do so.

On May 19, 1965, a hearing was held for the specific purpose of considering the right of these depositors to participate in the plan, after notice had first been given to each of them of the hearing. None appeared in person, but two were represented by counsel.

At that hearing, the broker, appearing as a witness, was able to trace and identify each of the fourteen deposit accounts, and his testimony was to the

effect that in each instance the deposits resulted from the information which he gave to the sources and in the manner above described, and that these deposits were made in reliance on an anticipated windfall. He could offer no other explanation or reason as to why any of these persons or organizations from out of the State would make their deposits in a Springfield bank.

Thus it is clear that these fourteen depositors had "inside" information which was received directly or indirectly from a broker who was then discussing with officers of the Society the possibility of terminating the activities of the Society as a mutual savings bank, by a sale or transfer of assets or otherwise, or that certain companies had expressed an interest in exploring the acquisition of the Society and its subsidiary banks, and, acting upon that information, they made their deposits in the hope of reaping a windfall that was to follow.

Petitioner contends that, by reason of these facts, the provisions of Item 2 of the plan of distribution above set forth is applicable to each of these fourteen depositors, and that they should be excluded from participating in the distribution of its assets.

It should be emphasized that the information

upon which these depositors acted was not culled from financial statements or based on documents or announcements relating to the financial condition of petitioner and available to all potential investors alike. It came to them in the manner above described, and there is no credible evidence in the record to the contrary.

The Court is aware that, by the ordinary standards which apply to the "market place," what happened as above related may be considered normal and proper, and the Court sees no need to make further comment on the ethical considerations that may be involved. However, it must be remembered that we are not dealing here with the practices of the "market place." Banks are in a different and special category. They provide the life-blood for our economy. The stability of the whole community may be undermined by any suspicion of manipulation or speculation in any of its affairs. That banks enjoy this special status may be attested by the many laws which zealously guard banks and which deal with and regulate their most detailed operations. By law they are subject to strict and frequent inspection, examination and regulation. Ohio statutes even make it a criminal offense to make any false statements or to circulate any rumors affecting the solvency of banks or

their earnings and management.

It should be noted that the trustees of the Springfield Savings Society, undoubtedly mindful of the sensitive nature of their position and anxious to avoid any suspicion of unjust enrichment accruing to themselves by reason of their access to confidential information, voluntarily renounced for themselves, their wives, and any of their children who lived with them after June 18, 1963, the right to participate in the surplus fund.

These fourteen depositors differ from the trustees only in that they themselves were not officers of petitioner or related to them, but they are otherwise alike in that they became privy to the same confidential information accessible to the others on June 18, 1963, and thereafter, and before the same became a matter of public knowledge.

Incidentally, the Cleveland case recognized the validity and logic of this reasoning and disqualified from participation those persons who became depositors after the negotiations for the sale of the Cleveland Savings Society began or increased their deposits after that date, on the ground that, having had information as of that date, they were barred. As previously noted, the record in the Cleveland case discloses that only

members and trustees of the two banks in Cleveland fell in that category, and thus there was no need in that case to consider the effect of this knowledge on any other persons.

This Court is of the opinion that the same reasons which led to the disqualification of the trustees and members of the Cleveland banks, and which by the voluntary action of the trustees of petitioner bars them and their families from participating, applies with equal weight to the fourteen depositors under consideration.

The Court wishes to observe that the petitioner could have remained silent with respect to these depositors, and perhaps no knowledge of the circumstances attending their deposits would have become available to the public or to the Court. The total amount of money involved in so far as the fourteen depositors under consideration and their proportionate share of the surplus are concerned would not greatly diminish the share that any one depositor would otherwise receive.

The relationship between a mutual savings bank and its depositors is not merely one of debtor and creditor, but one of agent and principal as well. This relationship was defined as long ago as 1896 by the then Circuit Court for this very district in a case, oddly

enough, involving the same petitioner but concerned with issues unrelated to those in the instant case. The Court refers to Collett, Treas. v. Springfield Savings Society, 13 O.C.C.R. 131. The Court in that case discussed the reasons for the existence of mutual savings societies and concluded that, while the relation of bank and general depositor is simply the ordinary one of debtor and creditor, "the relation of savings society, such as defendant, and depositor is that of agent and principal." It is elementary that an agent is regarded as a fiduciary, and the relationship between agent and principal is one that implies trust and confidence and unqualified exercise of loyalty, fidelity and good faith in the execution of its responsibilities. (See 2 O.J. (2d) 168, etc.)

The matter of these fourteen depositors was undoubtedly brought to the attention of the Court out of a sense of duty and the responsibility to its family of depositors, and the Court wishes to commend petitioner, its trustees and officers for their zeal in investigating and pursuing and presenting this matter as it did.

The Court wishes also to state that no criticism or slur is intended for any of the fourteen depositors, who, as far as the record discloses, acted in good faith and seized an opportunity to make what was

represented to them to be a highly lucrative investment. They are not being penalized by any decision reached by this Court. Their accounts are secure, and they, together with all other depositors, are entitled to receive and keep the interest accumulated to their accounts.

However, the Court does find that each of the fourteen depositors did have knowledge or information that the officers or trustees of the petitioner had discussed with individuals not associated with the Society the possibility of terminating its activities as a mutual savings bank and knew that the officers of an investing corporation had expressed an interest in exploring the acquisition of the Society, and that their deposits were made as a result of such information and for the sole purpose of speculating upon the possibility of participating in this surplus, and were not made within the usual and normal course of business.

With respect to these fourteen depositors, therefore, whose names are listed on Exhibit 1 filed at the hearing on May 19, 1965, all of whom opened regular savings accounts in the Springfield Savings Society after August 7, 1963, the Court rules that, under and by virtue of the provisions of Item 2 of the plan of distribution adopted by the trustees of the Savings Society--which

provision the Court finds reasonable and proper--all of the deposits made in petitioner by said depositors and all amounts credited as interest thereon shall be excluded in determining the amount of the lowest credit balance in each account to the credit of any said depositor.

In short, the Court rules that none of said depositors may share in the cash surplus assets of petitioner.

4.

The City of Springfield claims the right to participate in the distribution of assets and to a proportionate share of the same, and the Board of Commissioners for Clark County makes similar claim. They each point out that they had substantial deposits with petitioner at the times and between the dates set forth in the plan, and that they had no prior knowledge of any of the events that have transpired so as to disqualify them from participation.

The plan for distribution under consideration by the Court notes, among other depositors:

"(B) Governmental authorities for whose account the Society held moneys pursuant to the Uniform Depository Act of the State of Ohio con-

tinuously during the period commencing with the opening of business of Society on October 29, 1964, and ending with the assumption of Society's time and demand deposit liabilities by Bank."

The deposits of both these governmental bodies are governed by the provisions of chapter 135 of the Revised Code of Ohio, often referred to as the Uniform Depository Act. Section 135.16 R.C. requires the treasurer of either the city or the county involved to secure from the depository a pledge as security for repayment of the deposit, eligible securities having an aggregate market value equal to the excess of the amount of public moneys so deposited over and above the amount of Federal deposit insurance. (Presently the amount of such insurance is $10,000.)

Pursuant to this requirement, petitioner has secured each of these deposits by pledges of government bonds having a face value in excess of the amount of deposit.

These governmental bodies thus enjoy privileged positions with respect to their deposits. In the event of liquidation and in the further event that an insufficient amount of money was available to repay these depositors, the securities pledged for their repayment

could be sold and the claims satisfied. Thus, unlike the regular depositors, neither the City of Springfield nor the Board of Commissioners was subject to the normal risks and hazards assumed by other depositors. It is this distinction which led the Court in the Cleveland case to rule as follows:

> "Public funds were held by Society for the account of certain municipal corporations pursuant to special written contracts which were governed by the provisions of the Uniform Depository Act of the State of Ohio. These contracts provided for the payment of a fixed rate of interest, the repayment of all money held, and were fully secured by obligations of the United States of America. In light of the distinctive nature of these deposits, as contrasted to the regular savings deposits in Society, this court finds that this class of depositors shall not be entitled to share in the distribution of the remaining assets of petitioner."

This Court finds that it is compelled to agree with the logic and reasoning of this ruling, and in accordance therewith therefore rules that neither the City of Springfield nor the Board of County Commissioners

is entitled to share in the distribution of the assets of petitioner.

5.

The Ohio Center Corporation has filed a statement asserting a contingent claim against petitioner. Nathan and Mary Harris have also filed a claim based on personal injuries resulting from an accident allegedly occurring on petitioner's premises. These claims were considered and were disposed of in separate orders previously made by this Court. It is therefore not necessary at this time to render any further decision with respect to them.

6.

The petition calls attention to the several classes of depositors whose status and right to participate in the distribution of petitioner's assets need to be determined. Among these deposits are those pursuant to Christmas Club plans, deposits held subject to specific instructions in writing with respect to the use and disposition thereof and who may be referred to as "escrow fund depositors;" deposits in accordance with the terms and provisions of the various types of loan agreements which required the borrowers to pay certain sums at stated

intervals to be accumulated and applied to the payment of interest and installments of principal, taxes, etc., which may be referred to as V.A., F.H.A., and hypothecated fund depositors; deposits held subject to disbursement on demand or written order or for whose account the Society had issued for value official checks or other negotiable instruments prior to closing and which were outstanding at the time of closing.

It should be noted that no interest or dividends were paid or payable on such accounts, and no passbooks were issued to evidence the same.

In the Cleveland case, at pages 419-20, the Court indicated that there were four factors which should be considered in determining who is entitled to share in the distribution of surplus, as follows:

> "Only those persons who indicated an intention to become regular savings depositors, who received savings passbooks as evidence of their property interest in Society, who were entitled to receive dividends rather than interest, or nothing, whose right to withdraw their funds was determined in accordance with the regulations and rules relating to deposits, had intangible ownership interests in Society."

The Court went on to rule that:

"Persons owning or interested in Christmas Club accounts, escrow accounts, Employees' United States Savings Bond deposits, funds held for borrowers, borrowers' construction loan funds, hypothecated deposits on installment loans, outstanding certified checks, outstanding checks, and official checks did not meet the requirements necessary to create an intangible ownership interest. Contracts with such persons were special contracts which distinguished them from regular savings depositors. They had no savings passbooks in Society, received no dividends from Society, and their right, if any, to demand payment of such funds was determinable in accordance with their special contracts or general law and not governed in any way by the regulations and rules relating to deposits. Therefore, this court finds that these persons, or classes of persons, shall not be entitled to share in the distribution of the remaining assets of petitioner."

This Court agrees with the conclusions above reached, and it is the ruling of this Court that those deposits described and set forth in the first paragraph

of Item 6 of this opinion do not share in the distribution of petitioner's assets.

It is the further ruling of this Court that all remaining deposits and depositors, being either regular depositors, school depositors, or certificate holders, do meet the requirements and the standards set forth above and that they are entitled to share in the distribution of petitioner's assets.

The plan of distribution submitted to this Court is therefore approved, subject only to the decisions rendered by this Court on the several issues above noted and numbered 1 to 6 inc.

The Court orders and directs that distribution in cash of petitioner's assets shall be made not later than September 1, 1965, unless distribution on such date shall be prevented and made impossible by an appeal of the decision of this Court by any one of the parties to this action.

Petitioner is directed to prepare and submit to this Court for its approval, within the rules of court governing the preparation of journal entries, a proper journal entry making final determination of the several issues herein considered in the manner herein set forth.

Such journal entry, however, shall reserve to this Court full jurisdiction of all other matters which may hereafter arise in connection with the execution of the plan of distribution or anything else incident to the dissolution proceedings, excepting the issues herein considered and determined.

cc:

MESSRS. DUNBAR, KIENZLE & MURPHEY, Columbus, Ohio, and
MESSRS. COLE, COLE & HARMON, Springfield, Ohio,
on behalf of Petitioner

JAMES A. BERRY, ESQ., Prosecuting Attorney for Clark County, on behalf of Clark County Board of Commissioners

CHARLES E. CARTER, ESQ., City Solicitor,
on behalf of The City of Springfield, Ohio

LEONARD EPSTEIN, ESQ., 425 Park Avenue, New York, N.Y.,
on behalf of self

MESSRS. BAILEY & DOUGHTY, Springfield, Ohio,
on behalf of H. F. Usden and Albert Kraftschick

GEORGE R. BRIDGMAN, ESQ., London, Ohio,
on behalf of O. S. Kelly Company

THOMAS R. LAUDERMILK, ESQ., 636 Snowhill Boulevard,
Springfield, Ohio, on behalf of self

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

SIDNEY ELLIOTT, et al., Plaintiffs, v. FEDERAL HOME LOAN BANK BOARD, et al., Defendants	)	No. 63-1072-PH
EQUITABLE SAVINGS AND LOAN ASSOCIATION, Plaintiff, v. SIDNEY ELLIOTT, et al., Defendants	)	No. 63-1107-PH
SIDNEY ELLIOTT, et al., Plaintiffs, v. FEDERAL HOME LOAN BANK BOARD, et al., Defendants	)	No. 63-1230-PH MEMORANDUM AND ORDER ON ATTORNEYS' FEES

Two of the above actions were filed on September 10, 1963, the effective date of the merger of Long Beach Federal Savings and Loan Association, a federally chartered institution, into Equitable Savings and Loan Association, a California stock organization. The

other one was filed September 17, 1963 and transferred to this court.

As a result of the merger, a block of 791,650 shares of Equitable stock on the date the merger was consummated, viz., September 10, 1963, was available for distribution to Long Bea depositors as surplus, bonus, or net value, of the Long Beach Association. That is to say, Equitable agreed to assume the liability to each depositor of Long Beach for the total amount each deposit, as well as all liabilities of Long Beach, and to distribute to the depositors[1/] collectively 791,650 shares of it stock.

All of the suits, in effect, sought the same relief, viz. to have said 791,650 shares of Equitable Association's stock deposited in court, distributed according to the terms of the statute, the by-laws of Long Beach, the Settlement Agreement of February 14, 1962, and the passbooks issued to the shareholders of Long Beach, share and share alike rather than an unequal distribution "insisted" upon by an imprimatur of the Bank Board. Motions by each party for summary judgments were consolidated plaintiffs' motions were granted. See 233 F. Supp. 578 for the court's opinion. Judgment on that opinion, which also served

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1/ The market value at merger time of the total block of 791 shares was between $9,250,000 and $9,500,000 or about $12 per The market value on the dates of the hearings (June 1965) on within motions was between $5 and $6 a share. The book value latter date was approximately $8 per share.

ıdings of fact and conclusions of law, was made and entered
, 17, 1965.[2/]

On March 23, 1965, Charles K. Chapman, who represented the Long ıch Federal Savings and Loan Association since the inception of the ıigation involving the Long Beach seizure, twenty years ago in , 1946, and George W. Trammell, who represented the Shareholders' ɔtective Committee of the shareholder-depositors of Long Beach leral Savings and Loan Association from 1960 (following Wyckoff tover who died in 1956 and others who had previously represented m), filed a joint Petition and Motion for Partial Allowance on ount of Attorneys' Fees.

The Petition sought fees only to the date (October 29, 1963) the consented judgment for partial distribution of 700,000 of total shares on deposit in court, but at the suggestion of the rt the application was expanded to include services to and in- ding the entry of judgment by this court in the within cases on 17, 1965 (not including any appeal or services of any kind after 17, 1965).

Due notice of the motion was given by first class mail to all the shareholder-depositors of Long Beach and all counsel involved. motion came on for hearing, and was heard by this court on

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The lapsed time between the date of the opinion, September 22, 4, and the date of the judgment, was occasioned by the immense unt of calculations required on approximately 60,000 share ounts of Long Beach.

June 22, 23, 24 and 25, 1965. Nobody appeared in opposition t t application for attorneys' fees except the Government agencies re sented by Government counsel. One shareholder, who had long s ic withdrawn his funds and who was entitled to receive approximat ly shares of Equitable stock, appeared and said he objected, but h offered no testimony or evidence of any kind and did not remai i the hearing. What he "objected" to is still not of record or di closed to this court. But among 60,000 shareholders it is only normal that you must expect at least one objector. The Governm agencies appearing in the case offered no testimony or evidence o any kind and did nothing more than cross examine the witnesses w were produced by the petitioners. The petitioners produced evi oral, documentary, and factual, as well as expert opinion testim At the conclusion of the hearing the matter was submitted.[3/]

In addition to the original petition and motion for partia allowance of attorneys' fees, the petitioners filed a 128-page Affidavit reciting their services. No affidavits countering th Affidavit were filed. Upon stipulation of counsel, approved by order of the court, that Affidavit was admitted in evidence as d direct examination of Mr. Chapman and Mr. Trammell.

It is unnecessary to repeat here either the facts set for that Affidavit or the recitations which this court has made in previous opinions of the long history of this litigation except

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3/ An intervening tour of duty on the criminal calendar of th court prevented attention to this matter until now.

s/ that it began 20 years ago in May 1946 by the seizure, without notice, of the Long Beach Federal Savings and Loan Association, which resulted in much litigation concerning that seizure as well as the seizure and dissolution (also without notice) of the Los Angeles Bank of the Federal Home Loan Bank Board. One threatened seizure was later enjoined, and another one occurred in 1960, also without notice. All of these seizures were marked by bitterness, refusal of the Government officials to give receipts for cash and other negotiable securities, multi-million dollar runs of withdrawals by depositors, constant, varied and seemingly continuous and interminable litigation,[4/] and three congressional investigations resulting in reports covering several thousand printed pages, and also resulting in drastic changes in the law.

The picture seemed somewhat to brighten in the early part of 1962, when, on February 14, 1962, a Settlement Agreement was entered into between the Long Beach Federal Savings and Loan Association and the Federal Home Loan Bank Board which called for dismissal of all litigation and what amounted to payment of $5,000,000 in damages to

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4/ There were 27 cases in the Federal court, and 11 in the State court, and more than 450 pages of docket entries. Aside from the many unreported findings and orders, more than 400 pages are required in the official printed volumes of reports to cover the many opinions written involving this litigation. About 200 pages were written by me and it is unnecessary to repeat them or even summarize them. To grasp the scope and complexity of this litigation or the extent of petitioners' services one should read all the reported opinions, at least.

the Long Beach Association, and the approval of a merger betwee
Long Beach Association and the Equitable Savings and Loan Assoc
Due to the many complications involved, it took some time to im
that agreement. This court, in the exercise of its duty, deeme
necessary to notify by publication and direct mail all the depo
and shareholders of Long Beach, which entailed a tremendous job
printing and mailing. The Settlement Agreement was finally app
(the appearances in opposition to it were less than five, and n
of them offered any ground), and on April 2, 1962 the Associati
returned to its original management.

According to the uncontradicted evidence before the court,
Attorneys Chapman and Trammell had in the meanwhile, since 1958
been working together with the officers of both the Long Beach
Association and the Equitable Association looking towards a mer
of Long Beach into Equitable. Arrangements for the financing,
$5,500,000, for the conversion and merger of Long Beach into a
association had been completed, and the State examiners were in
Long Beach Association conducting the audit required for such c
version when the Board again, in April 1960, seized the Associa
without hearing or notice. The financing withdrew when the Apr
1960 seizure took place, which required everybody to start over
on merger plans. A merger between Long Beach and Equitable was
approved in the Settlement Agreement. But, according to the un
tradicted testimony, within about six weeks from the date the
Association was returned (April 2, 1962), the Federal Home Loan

Board attempted to renege on their approval of the Settlement Agreement and began to throw obstacles in the way of any merger. The Board, in absolute contradiction to the specific terms of the Settlement Agreement, insisted on other than pro-rata distribution of surplus of Long Beach. Another congressional investigation followed and, according to the uncontradicted testimony, it required the almost daily services of Attorney Chapman to be in contact with the changing phases of the merger and the numerous resulting problems encountered, such as, for instance, increasing the capitalization of Equitable in order to be able to receive Long Beach in a merger, repeated drafting and redrafting of the merger agreement, the supervision of accounting, securing of appraisers, a thorough examination of tax consequences, stockholders' meetings, drawing proxies, and many others,[5/] which, as above stated, compelled the almost constant attendance and advice of Attorney Chapman, and the occasional advice and contact of Attorney Trammell representing the shareholders, in order to effectuate the merger agreement which was finally executed under date of June 12, 1963, more than a year after the Association had been returned, and was effected on September 10, 1963.

The three instant suits are the result of disputes which arose during the course of the merger agreement concerning the insistence

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/ Illustrative of how wide-ranging counsel's services were, was his participation in the conversion of Bellflower Savings & Loan into a California State association, and then its merger with Equitable, as part of the ultimate plan in merging Long Beach and Equitable.

by the Bank Board, contrary to the Settlement Agreement it execut
first, to eliminate from any share of the surplus all depositors
more than $100,000 after the April 22, 1960 seizure, and their su
sequent "insistence" to eliminate from any share of the surplus t
having more than $10,000 on a new deposit after April 22, 1960, a
well as every shareholder, regardless of the size, who had pledge
his account (passbook) on a loan,[6/] and other restrictive things.
These things are more fully covered in the Memorandum Opinion abo
referred to, which is reported in 233 F. Supp. 578.

Further recitals could be made concerning this unbelievable
litigation, but I will refer anyone who gives consideration to th
matter to the more than 400 pages of printed opinions which appea
the reports of this court and the appellate courts, the titles an
citations of which are set forth more particularly in footnote No
of 233 F. Supp. 578, and to the above-mentioned joint Affidavit o
Chapman and Trammell.

Numerous cases are cited by the petitioners in support of th
position that they are entitled to attorneys' fees. As the judge
has sat through countless days and many nights in hearings, resea
and opinion writing over a 20-year period, I am thoroughly famili

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6/ There were 324 shareholder-depositors with accounts of $500 o
less, each of which was pledged as security for a loan against th
account. It would be a prohibitive burden on any or all such sma
accounts to have undertaken litigations against the Bank Board an
Insurance Corporation to enforce their pro-rata rights to the sur
plus of Long Beach.

th the work done and the ingenuity and skill and persistence quired of the attorneys for the petitioners here, as well as the ubborn persistence and ingenuity of Government counsel in creating ministrative and legal obstacles. There can be no doubt that the titoners are entitled to a decent compensation.

Many cases are cited in support of the various elements to be ken into consideration in fixing attorneys' fees especially where ey are dependent upon a contingency. Perhaps the most succinct e Angoff v. Goldfine (1 Cir., 1959), 270 F. 2d 185, and Twentieth ntury Fox Film Co. v. Goldwyn (9 Cir., 1964), 328 F. 2d 190, cert. n. 379 U.S. 880, the pertinent portions of which are quoted in otnote 7.

Angoff v. Goldfine, 270 F. 2d 185 (1 Cir., 1959), pages 188-189:

"[3] . . . the following factors are to be carefully considered and weighed in fixing the amounts of compensation to be awarded in cases of this sort. These factors are: the amount recovered for the corporation; the time fairly required to be spent on the case; the skill required and employed on the case with reference to the intricacy, novelty and complexity of issues; the difficulty encountered in unearthing the facts and the skill and resourcefulness of opposing counsel; the prevailing rate of compensation for those with the skill, experience and standing of the attorneys, accountants or others involved; the contingent nature of the fees, with the accompanying risk of wasting hours of work, overhead and expenses (for it is clearly established that compensation is awarded only in the event of success); and the benefits accruing to the public from suits such as this. And these criteria have frequently been spelled out by the courts. . . ."

and further at page 190:

"[5, 6] . . . if that [prior] proceeding in fact produced a benefit to the corporation on behalf of which the main action was brought, we fail to see why that benefit should not be considered in fixing counsel fees and expenses in the main action, for we do not think an attorney's compensation should

7/ Continued.

be made rigidly to depend upon the precise means by whic a fund is recovered for a victimized corporation.

". . . an attorney is entitled to an award of compensatir based on benefits obtained by a corporation as a result f his efforts short of bringing suit . . . ."

and at page 191:

". . . it was established long ago that agreements to pa a contingent compensation for professional legal service of a legitimate character is not in violation of federal law or public policy, even when prosecuting claims againt the United States. Stanton v. Embrey, 1876, 93 U.S. 548 556, 23 L.Ed. 983; Taylor v. Bemiss, 1884, 110 U.S. 42, 5 46, 3 S.Ct. 441, 28 L.Ed. 64 . . . ."

The Ninth Circuit in Twentieth Century Fox Film Corp. v. Goldwyn, 328 F. 2d 190 (9 Cir., 1964), cert. den. 379 U.S. 8 set forth some of the same factors in the following languag p. 221:

"[31] . . . these factors [value of attorneys' fees] incu (1) whether plaintiff's counsel had the benefit of a pri judgment or decree in a case brought by the Government, 2 the standing of counsel at the bar--both counsel receivig the award and opposing counsel, (3) time and labor spent (4) magnitude and complexity of the litigation, (5) re- sponsibility undertaken, (6) the amount recovered, (7) te knowledge the court has of the conferences, arguments tht were presented and of work shown by the record to have be done by attorneys for the plaintiffs prior to trial, (8)w it would be reasonable for counsel to charge a victoriou plaintiff, and (9) what contribution shall be made by th defendant toward the fees of plaintiff's counsel.

"While all or most of these factors are useful as guidesi fixing such fees, they provide nothing approaching a prei yardstick. In the long run, the weight to be accorded te and other factors in fixing the fees in a particular cas must rest largely upon the good judgment of the district court."

". . . They [defendants] do question the necessity for mc of this work. However, this is almost like saying that l tiff could have won more easily--a not very telling argue when made by those who contend that plaintiff should noth won at all.

"The lawsuit was most vigorously contested from beginnin end. Numerous complex legal and factual issues were invl . . . ."

In the last case it is noted that while the factors mentioned re useful as guides in fixing such fees, they provide nothing approaching a precise yardstick. In the long run the weight to be corded these and other factors in fixing the fees in a particular se must rest largely upon the good judgment of the district court."

In view of the very unusual nature of the litigation and the rvices involved in this case it is difficult to apply precise ndards. The Ninth Circuit stated (11 years ago) that:

> " * * * we have pointed up in our opinions that its unique and unprecedented pattern is without a counterpart in the books. No reported case or controversy has been called to our attention which even remotely resembles it. * * * It is our considered judgment that it would be impossible to find in the books a more unique, confusing and extraordinary pattern of litigation or one more shot through and through with 'exceptional circumstances.' * * *" Federal Home Loan Bank, et al. v. Hall, et al. (9 Cir., 1955), 225 F. 2d 349, at 368, n. 8.

The petitioners' services began in 1946 and involved litigation ncerning not only the seizure of the Association but the disution of the Los Angeles Federal Home Loan Bank and its transfer San Francisco. All involved a stupendous amount of work of almost ry conceivable kind in connection with those proceedings, and even transfer back to the officers of the Association from the Home

Loan Bank Board required this court to lay down procedures invo very great efforts in unbelievable detail in the matter of retu the Association in 1948. To give a small idea of what the firs litigation amounted to, the court appointed a special master to over depositions and the turn-back and allowed him $90,000 as a therefor which was approved by the appellate court.

After that there was again another threatened seizure and further litigation enjoining it. There were three congressiona investigations; there was an effort to get the Association out the federal system so as to merge it with Equitable which involv going through the California Savings and Loan Commissioner, requ ing intricate proceedings, exhaustive factual and legal examina and the like. During the process, there was again the second seizure in 1960, following which there was another congressiona investigation.[8/]

8/ Exhibit 24 is a printed copy of House Report No. 2083, "Fede Home Loan Bank Board Seizure of Long Beach Federal Savings and L Association."

The Findings of the Committee appear on pages 19 and 20 the and read as follows:

> "FEDERAL HOME LOAN BANK BOARD--LONG BEACH SEIZURE
>
> "FINDINGS
>
> "The subcommittee finds as follows:
>
> "(1) The Board members were uninformed about many matters of regulatory policy and administrative routine governing their own Board's operations. They relied excessively on legal and supervisory staffs for information and advice on matters which ordinarily should be within their own competence.
>
> "(2) The Board members and supporting witnesses were unacquainted with many facets of the Long Beach Federal controversy even though it has taken a large portion of their time and attention. The findings which the Board

Continued

made as the basis for summary seizure presupposed a knowledge of facts and circumstances which the Board members did not possess.

"(3) The Board's inability to inform the subcommittee on many matters was compounded by its unwillingness to testify on others, based upon various claims of privilege. In the first instance, the Board entered a general refusal to testify and challenged the propriety of the subcommittee's inquiry by claiming judicial privilege. In the course of the testimony several variants of executive privilege also were claimed.

"(4) Notwithstanding that privilege is a highly personal and nondelegable matter, Board Chairman Robertson was unacquainted with the legal basis of his claim and was unable to amplify or illumine in any particular a prepared statement which he read to the subcommittee in asserting the claim of judicial privilege. Upon examination of the legal and other citations in the statement, the subcommittee found no grounds whatever for the claim.

"(5) To justify summary seizure of Long Beach Federal without prior notice, the Board was required to determine that an emergency existed. The charges cited by the Board as the basis for the seizure order dated back 11 or 12 years in some instances, 2 or 3 years in others, and in any case involved matters which were known to the Board or its supervisory staff and discussed with the association from time to time. The record shows that the Board had discussed the possibility of seizing Long Beach Federal over a period of years but did not decide to take such action until after it learned that the association had applied for a State charter.

"(6) Some of the charges cited in the Board seizure order concerned matters in pending litigation, and for the association to comply in the manner sought by the Board would have required the association to prejudice its own position in the litigation.

"(7) If any or all of the charges cited in the Board seizure order were valid and justified, then the Board was derelict in its duty in failing to issue explicit supervisory letters or 'stop' orders and require compliance over the course of time which encompassed the matters charged.

"(8) The Board would have been derelict in its duty even if an emergency had existed, since these charges should not have been allowed to accumulate. However, it

8/ Continued

is very clear that an emergency of the type contemplated in the 1954 amendments to the National Housing Act (12 U.S.C., sec. 1464) did not exist. Summary seizure was chosen as one of several supervisory techniques, as 'the better way to handle it,' and for this reason the Board's action was an arbitrary and unlawful exercise of power.

"(9) A better explanation of the summary seizure action was the Board's unwillingness to permit Long Beach Federal to convert from a Federal to a State-chartered association, which conversion is permitted by law. The seizure order came on the heels of an application by Long Beach Federal to the California State authorities for conversion and a subsequent examination by State examiners, which was interrupted by the seizure action.

"(10) The Board contemplated, when it directed the seizure, that there would be a 'run' on the association by depositors, and it arrange in advance for a $30 million loan by the Insurance Corporation to the association. At the time of the hearings, 6 weeks after seizure action, approximately $37 million had been withdrawn from the $96 million association.

"(11) The Board exercises its regulatory powers largely by informal conferences, conversations, and correspondence and by threats to exercise more drastic methods if corrective actions decided by the Board or its supervisory staff are not taken. These informal methods of regulation largely unrecorded and lacking procedural uniformity, place a vast machine of personal power in the hands of the Director of Supervision, who supervises more than 1,800 Federal associations.

"(12) The Board has ignored the intent of Congress and the plain meaning of the law in failing to formally notify the association of alleged violations of laws and regulations and give it opportunity to take corrective action. In the 6 years since the Congress provided for such administrative action, the Board has utilized this procedure in only a single instance. The congressional enactment has fallen in a crack between informal, personal supervision on the one hand and drastic seizure on the other.

"(13) The supervisor in charge of Long Beach Federal acted arbitrarily and unfairly in summarily discharging more than a score of employees without allowing sufficient time to review their capabilities and loyalties. Further, the importation of employees from other savings and loan associations, which were competitors of Long Beach Federal was unwarranted and the prejudicial to the interests of Long Beach Federal.

/ Continued

"RECOMMENDATIONS

"Notwithstanding the lack of cooperation on the part of the Board witnesses, the subcommittee did secure substantial information under oath to justify the following recommendations, and based upon the information secured, the subcommittee recommends as follows:

"(1) The Board should restore forthwith Long Beach Federal to its former management.

"(2) Upon restoration of Long Beach Federal to its former management, the Board should then determine which of its charges still have merit, should state them in a clear and definite manner, and should utilize the procedures prescribed in section 5(d)(1) of the Home Owners' Loan Act of 1933, as amended, to duly notify the association and to request corrective action.

"(3) As a general policy, the Board should give effect to section 5(d)(1) of the Home Owners' Loan Act of 1933, as amended, by formally specifying charges when violations of law or regulations are alleged, duly notifying the associations concerned, and giving them opportunity, as prescribed by law, to take corrective action.

"(4) In effecting the return of Long Beach Federal to its former management, the Board should utilize the financial and credit resources of the Federal Savings and Loan Insurance Corporation and the Federal Home Loan Bank of San Francisco to enable the association to repair the damage done by the seizure and to regain its previous business position.

"(5) If and when any Federal association's shareholders, by the means prescribed in the law, record their wish to convert from a Federal to a State association, the Board should refrain from interfering and putting obstacles in the way of this conversion.

"(6) The Board should make a concerted and wholehearted effort to bring to a close long-standing legal controversies with Long Beach Federal by settlement or compromise of the litigation or by withdrawal of interferences to a speedy resolution of the litigation.

"(7) The Board, in exercising its supervisory authority, should refrain from using this authority to circumvent or interfere with litigation properly brought to the courts by savings and loan associations.

"(8) Pending revision of the applicable legislation, the Board should by regulation establish uniform criteria for determining what constitutes unsafe or unsound practices of association management."

There were claims for damages by the Association against the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation, and the individual members of the Board and other officers of the Board. These were not ephemeral and trivial as indicated by the fact that in the Settlement Agreement the Federal Home Loan Bank Board and Insurance Corporation in effect agreed to, and did, pay $5,000,000 as damages by way of discharging interest obligations of Long Beach Association in that amount. The handling of the Association by the agencies of the Federal Home Loan Bank Board caused litigation and trouble from others. Just one illustration, there was a large loan of about $20,000,000 where a subdivision was being developed with a golf course and other facilities, all of the money for which was handled through the Long Beach Association. When the supervising agent in charge for the Home Loan Bank Board came in in April 1960 he stopped all advances of money, and (apparently either he or those in Washington were unfamiliar with the mechanics lien laws of California) he testified from the stand that he was instructed not to record the $20,000,000 trust deed, and it was not done until the court ordered it to be done about 60 days later in the course of one of the hearings, so that the trust deed note of the seized Association would be ahead any mechanics liens for labor and material. Simple prudence in the management of the seized Association would have required the immediate recordation of that trust deed upon seizure and stoppage of the flow of construction money.

The Settlement Agreement itself is a long, complicated, in-
ed document, and provided for the dismissal of the then pending
gation, the return of the Association to its elected management,
discharge of $5,000,000 in interest heretofore mentioned; and
pproved the proposed merger between Equitable and Long Beach,
distribution of the Long Beach surplus pro-rata among its
eholder-depositors which, as hereinbefore indicated by the un-
radicted testimony before this court, the Government defendants
ged on after the return of the Association. As hereinbefore
ed, there followed another congressional investigation, and
lly a merger agreement resulted with heretofore-mentioned re-
ctive conditions in it which were contrary to the Settlement
ement and which the Association contended, and which were
rary to law and which resulted in the three suits upon which
ment was entered by this court in May 1965 and are now on appeal.
There can be no doubt that it was the result of the litigation
enced by Attorney Chapman and his continued and persistent and
rceful efforts, and by the Shareholders Protective Committee,
the Association was finally returned, and thus the Long Beach
iation and Equitable were able to complete the merger on
mber 10, 1963, negotiations for which had begun in 1958, which
ted in the 791,650 shares of Equitable stock for distribution
ng Beach depositors.
In the Settlement Agreement, the Association and the Share-
rs' Protective Committee, the Federal Home Loan Bank Board and

the Federal Savings and Loan Insurance Corporation agree that the Government agencies will not object to attorneys' fees "for past unpaid-for services to the date of the Agreement (February 14, 19 arising out of the prior conservatorship in 1946-1948 in an amoun not exceeding $500,000." (Article XIII, c.) The Government contends that that, together with a provision in the Proxy Statement limits any fee to Mr. Chapman to that sum.[9/] I do not so read eith and, taken both together, a contrary conclusion is required.

It is to be noted in the Settlement Agreement (p. 39) that i only relates to "past unpaid-for services to the date of this agre ment arising out of the prior conservatorship in 1946-1948 in an amount not exceeding $500,000." It says nothing about limitation the fees to prevent the attempted seizure in 1959; it says nothin about the services after or during the 1960 seizure. It says not

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9/ "(3) The Association, in arranging for ultimate discharge of the balance of its liability to Attorney Charles K. Chapman for his services in connection with the 1946-1960 seizures litigation, made $504,000 loans to said attorney secured by shares of the Association issued to U.S. National Bank of San Diego as trustee under Installment Charity Trust. Said share loans and Association's liability for said attorney's fees in said litigation are to be concurrently cancelled in installments over a 15 year or longer period. The Association has established a specific reserve out of undivided profits (per Settlement Statement) for its full liability in connection herewith; and, as its obligations for payment of such fees are discharged, the specific reserves therefor will be restored to Undivided Profits and legal expense will be charged."

Quoted from Proxy Statement re merger.

bout the services in connection with either the negotiation of the ettlement Agreement or the merger or the three instant suits plainly ntemplated by the merger agreement, or numerous other services. e portion of the Proxy Statement quoted in footnote 9 plainly dicates the loan does not contemplate the "ultimate discharge" liability for Chapman's services by it. The merger agreement st be read with the Settlement Agreement, as is indicated not only the two agreements but by the Proxy Statement [Exhibit E, pp. 16, , 21, 23, 44, 45 and p. 51].

The Government contends that the $504,000 mentioned in the oxy Statement and quoted in footnote 9 is actually a payment of 04,000 to Attorney Chapman. These are loans, not payments. torney Chapman still owes $504,000, and by his undisputed state- nt has already paid some $35,000 in interest to the Long Beach vings for the use of the money. The advantage to Attorney Chapman virtue of that loan comes only because he pays a low interest te of 1-1/4% and is able to reinvest the money at a higher terest rate, and because the loans are for a period of 20 years until after his death. While his creditor, that is, the owner of e notes, changes, on conditions, from the Long Beach Association to ilanthropic associations, Chapman still owes the $504,000, and will ve to pay interest until he, or his estate, repays to someone the ole $504,000.

The loan does have a present value as of the date of the merger, lich, according to standard practices, can be appraised. At the

court's suggestion the petitioners secured an expert who gave an appraisal of the present value on that loan in November 1962 of $109,527, and the court finds that that was the value to Attorney Chapman of that loan on that date.

To try and segregate the services here rendered by the petitioners in connection with the different facets of the many proceedings and things done by Mr. Chapman would be like trying to pinpoint each color in a thousand foot wall painted with a paint which had been blended out of every color of the rainbow.

The one thing which is outstanding in connection with attorney fees is that almost everything which has happened in all the litigation and hearings was interlinked somewhat and somehow with every other thing that was done or attempted. For instance, there could have been no merger, and hence no surplus permitting the 791,650 shares to be distributed to the shareholders of Long Beach Federal Savings and Loan Association, if the Association had not been released from the first seizure, and from the second seizure; and in an overall appraisal of the series of events involved, the merger, which was the heart of the Settlement Agreement, was the final act which not only produced the value to the surplus but took the Association from under what it considered to be the harrassment of the Federal Home Loan Bank Board.

While it is true that in the Settlement Agreement a $5,000,000 advantage was obtained by way of what Mr. Chapman calls damages to the Long Beach Association, and while it is true that $3,000,000

d for the goodwill of Long Beach Association by Equitable, and
le it is true that a tax advantage accrued in the sum of probably
eral million dollars by virtue of the manner of handling the whole
nsaction, and while it is true that the $3,000,000 contemplated
be put in escrow for ten years under the Settlement Agreement
the Long Beach Association was released for immediate use by
itable, and while it is true that the merger resulted in a more
n $150,000,000 institution, nevertheless all of these things
minated in one tangible benefit to the depositor-shareholders
Long Beach, namely, the right to a pro-rata share of 791,650
res of Equitable stock received as a bonus or surplus from
itable in addition to having Equitable assume the full and
plete responsibilities for all of their deposits as they stood
the time of merger, and also assuming all liabilities of Long
ch. The last-mentioned are intangibles and have great value to
g Beach, but I see no way of placing a dollar value on them.

One intangible was getting the Board, through the Insurance
poration, to take over the entire 20 million dollar Bellehurst
n, which is still in litigation.

No matter how the appellate court decides the appeals in these
ee cases, 791,650 share of Equitable stock still must go to the
reholder-depositors of Long Beach. While they may go in pro-
tions which are contrary to law, nevertheless they do go to them
a benefit.

The Government complains that the papers filed by Mr. Chapm in connection with the various litigation were prolix and unnece I concede, as the judge who has had to examine and read every on them, that some of them are a little long, but I cannot say that they were unnecessary. It is an old axiom, which some lawyers l only from bitter experience, that it is much better to have an essential allegation in a document than to have it out.

In considering the nature of the opposition, I can draw on m own experience of 50 years at the bar with 25 years on the bench and say that I have never seen a lawsuit where the plaintiffs encountered a more stubborn and determined opposition than the L Beach and the Shareholders' Protective Committee have incurred t date from the Federal Home Loan Bank Board. Every conceivable administrative and legal obstacle has been invoked. It is only with what I must say has been remarkable ingenuity, experience a perseverance on the part of the petitioning attorneys in this ca that any results have been achieved at all, and they have done s knowing the payment of any fees was contingent on success.

One of the elements emphasized in the reported decisions is contingent nature of the fee. The testimony is uncontradicted th as far as the services of the petitioners are concerned, they ag from the beginning that their fees would be of a contingent natu and would ultimately be set by the court. Certainly, if they ha never recovered the Association and the merger with Equitable ha never been effected, there would have been no occasion for any f

nd to indicate the risk they took, the evidence is uncontradicted oncerning the overhead borne and paid out by Mr. Chapman and by r. Trammell. The total overhead by Mr. Chapman for the years 1958 o the end of 1964 is $627,929.35, to which he attributes--without ny contrary testimony, I again must emphasize--that $302,575.83 is he share of the overhead attributable to the merger, without re- ard to the seizure and other litigation.

Mr. Trammell's total overhead from the year 1960 when he came nto the case to 1964 is $101,610.35 to which he attributes 23,776.90 to the services in connection with the merger. Thus here is over $325,000 in overhead which the petitioners here had aid out in order to accomplish the merger only, which is only part f the services rendered and results obtained in this case.

The two experts who testified, Mr. Simpson and Mr. Belcher, re men of outstanding ability and a long period of practice in ntricate and involved litigation. The testimony was that the fees o be paid to the petitioners should be between 25% and 33% of the enefit accrued. As heretofore indicated, the benefit accrued was ne 791,650 shares of stock.

The only possible way to fix a fair fee in this series of xtraordinary disputes and litigation is to take into consideration ne ultimate benefit achieved, viz., 791,650 shares of Equitable tock; fix a year by year value for the services rendered, and ubtract the amounts previously received on account.

To state this in terms of dollars, it is first necessary to fix the per share value of Equitable stock. The book value, in m judgment, is nearest the measure of true value for the purpose of this determination as opposed to market value either at the date of the merger or the date of the hearing. The undisputed testimo is that the book value on the date of the hearing was approximate $8 per share. Upon that testimony and after examination of the December 31, 1964 Financial Statement of Equitable [Exhibit 16], I find $8 per share to be the value of each share of the 791,650 shares of stock, for the purposes of determining fair and reasona fees to petitioner.

In early 1949 I allowed Attorney Chapman $270,000 fees on account for his services from May 1946 to the end of 1948, but, upon representation of the Assistant to the Attorney General that the litigation would be forthwith settled, a stipulation was made that the payment of two-thirds thereof was stayed and only $90,00 was paid to him.

Within less than a week that stipulation was repudiated by t then Attorney General without consultation with the judge who ha approved the stipulation upon representation that the then Attor General personally approved it. At that time the allowance was on account, and the said stipulation included terms that the Ass ation would be returned, the cases would be settled and that the court would determine the total fees to which Attorney Chapman w be entitled.

That the value of Mr. Chapman's services in connection with the 6 seizure was far in excess of $270,000 is indicated by the here-efore-mentioned provision in the Settlement Agreement approved by Bank Board which, in effect, conceded his services in connection h that seizure were worth at least $500,000 in addition to the ,000 paid him on account. Those services, however, continued g after 1948, not only in attempting to get an accounting from conservator but in State court lawsuits[10/] resulting from acts en by the conservator.

In viewing the whole kaleidoscope of the numerous controversies innumerable problems, which were continuous, and the results ieved, the sum of $90,000 per year for each of the 19 years from 1946 to December 1964, inclusive, for Mr. Chapman's services is sonable and fair, and I so find.

I therefore conclude that the reasonable value of Mr. Chapman's vices are fixed and allowed as follows: $90,000 for each of the rs 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 7, 1958, 1959, 1960, 1961, 1962, 1963, and 1964. From these sums re is to be subtracted the sum of $90,000 paid Attorney Chapman account in 1949, the sum of $160,000 paid on account in 1962, the of $109,527 on account (the present value of the $504,000 loan as November 15, 1962), and $65,000 paid him on account as mentioned

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10/ Divorces, condemnation, quiet title, income tax, fraud and almost other kinds of litigation.

in Exhibit 12, lines 5 to 8, which totals a deduction in round numbers of $22,000 separately for each year of the 19 years. Tha leaves the net sum of $68,000 which I fix and allow as the reasor able unpaid value of his services, separately, for each of the years 1946 to 1964, inclusive, to be paid Attorney Chapman.

It is to be distinctly understood that nothing herein said i to be considered or construed as allowing a lump sum fee in any amount, but each year's work is to be compensated as a separately allowed fee for each year to Attorney Chapman only as above stat

Coming now to the attorney for the Shareholders' Protective Committee. Counsel requested that one fee could be allowed and divided by agreement between them. But it has not been treated that way by the parties, the lawyers, or the Bank Board. And I o not think it should be treated that way now. The great bulk of t work has been done by Chapman, and he has carried the expense, e to paying out of his pocket a fee of $50,000 to a lawyer for ass ing him in one phase.

By the Settlement Agreement, Article XIII, the Bank Board agreed to interpose no objection to:

> "b. Attorneys' fees for services rendered to date by attorneys for the Shareholders' protective Committee and trustees under deeds of trust in connection with litigation arising out of said prior conservatorship, in an aggregate amount not exceeding $100,000; and attorney fees and costs paid in settlement

of the San Francisco Bank litigation"; (Underscoring supplied)

This sum has been paid, and Mr. Trammell, who became attorney the Shareholders' Protective Committee in 1960, acknowledges ient for all his services, except in connection with the merger, services have been continuous in that respect since 1960. He has five years of services on the merger uncompensated, for h the sum of $10,000, separately, for 1960, 1961, 1962, 1963 1964 is reasonable and is fixed and allowed, not as a lump sum but for each year separately.

The allowances made herein are well within the range of lity testifed to by the experts.

The question now arises as to whether or not any of this sum be assessed against the defendants. I do not think any of it be assessed against the California State Building and Loan issioner, and indeed I do not think it should be, because he only been more or less a formal defendant. I do not believe any of it can be assessed against the Federal Home Loan Bank d because, howsoever grossly wrong their actions may have been, acts which the Board did in this case were governmental actions it was not acting in a proprietary capacity. However, the ral Savings and Loan Insurance Corporation is a sue and be sued oration; it is not engaged in a governmental capacity; it is ged in a proprietary business, and collects premiums paid by sitors. It is run by the same people who run the Bank Board

although they wear a different hat. But in looking at the Sett[le]ment Agreement as a whole, it is the opinion and judgment of the court that the $5,000,000 advantage secured by Long Beach by the Settlement Agreement comprehended whatever liability the Federal Savings and Loan Insurance Corporation had for attorneys' fees.

In discharging the judgment, the 71,183 shares of stock remaining in court, after compliance with the prior judgments of the court, may be used in whatever manner is agreeable to petitioners and Equitable to be expressed by stipulation, subject to approval of the court.

I am of the present opinion that this Memorandum contains all the findings of fact and conclusions of law which are necessary under Federal Rules of Civil Procedure 52(a), but petitioners may within five days, suggest that they desire additional findings and conclusions to be submitted later, if they deem them necessary or proper. If not, this will also serve as the formal order of allowance.

Dated at Los Angeles, California, this 25th day of July, 19[illegible]

s/ Pierson M. Hall
PIERSON M. HALL
UNITED STATES DISTRICT JUDGE